

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	File No.: EB-06-TC-062
)	
CyberData, Inc.)	NAL/Acct. No.: 20073217 0062
)	
Apparent Liability for Forfeiture)	FRN: 0016722712
)	
)	

ORDER

Adopted: December 7, 2010

Released: December 8, 2010

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this *Order*, which follows upon a *Notice of Apparent Liability for Forfeiture*,¹ we determine that no forfeiture penalties should be imposed on CyberData, Inc. (“CyberData”). In the *NAL*, issued July 18, 2007, the Enforcement Bureau (“Bureau”) found CyberData apparently liable for a forfeiture of \$13,500 for violations of Section 227 of the Communications Act of 1934, as amended (“Act”),² and the Commission’s related rules and orders because it appeared that CyberData had delivered three unsolicited advertisements to the telephone facsimile machines of three consumers. Consistent with Section 503(b)(4) of the Act, the Bureau gave CyberData an opportunity to show, in writing, why the proposed forfeiture should not be imposed, and CyberData filed a response to the *NAL* on July 24, 2007 (“July 2007 Response”).³ Based on our review of CyberData’s July 2007 Response and the record, and as explained below, we find that CyberData did not violate Section 227 of the Act, or any relevant Commission rule or order. Consequently, we conclude that no forfeiture should be imposed.

II. BACKGROUND

2. Section 227(b)(1)(C) of the Act makes it “unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States . . . to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement.”⁴ The term “unsolicited advertisement” is defined in the Act and the Commission’s rules as “any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person’s prior express invitation or permission, in writing or otherwise.”⁵

¹ *CyberData, Inc.*, Notice of Apparent Liability for Forfeiture, NAL/Acct. No. 200732170062, 22 FCC Rcd 13131 (Enf. Bur. 2007) (“*NAL*”).

² 47 U.S.C. § 227.

³ Letter from Ralph Potente, President of CyberData, Inc., to Office of the Secretary, FCC, and Colleen Heitkamp, Chief, Telecommunications Consumers Division, Enforcement Bureau, File No. EB-06-TC-062, dated July 24, 2007.

⁴ 47 U.S.C. § 227(b)(1)(C); *see also* 47 C.F.R. § 64.1200(a)(3).

⁵ 47 U.S.C. § 227(a)(5); 47 C.F.R. § 64.1200 (f)(13).

3. These rules apply only in certain circumstances to a “facsimile broadcaster,” defined as “a person or entity that transmits messages to telephone facsimile machines on behalf of another person or entity for a fee.”⁶ Under the rule, “a facsimile broadcaster will be liable for violations of [the junk fax rules], including the inclusion of opt-out notices on unsolicited advertisements, *if it demonstrates a high degree of involvement in, or actual notice of, the unlawful activity and fails to take steps to prevent such facsimile transmissions.*”⁷

4. On February 15, 2006, in response to at least one consumer complaint alleging that CyberData had faxed unsolicited advertisements, the Bureau issued a citation⁸ to CyberData, pursuant to Section 503(b)(5) of the Act.⁹ The Bureau cited CyberData for using a telephone facsimile machine, computer, or other device, to send unsolicited advertisements for mortgage financing and refinancing, as well as debt consolidation, to a telephone facsimile machine, in violation of Section 227 of the Act and the Commission’s related rules and orders. The citation warned CyberData that subsequent violations could result in the imposition of monetary forfeitures of up to \$11,000 per violation, and included a copy of the consumer complaints that formed the basis of the citation. The citation informed CyberData that within 30 days of the date of the citation, it could either request an interview with Commission staff, or provide a written statement responding to the citation. On February 27, 2006, CyberData submitted a letter in response to the citation (“February 2006 Response”) stating that CyberData, “among other services it provides, is a fax service bureau that sends and receives faxes on behalf of its clients.”¹⁰ Further, CyberData stated that the company “never has a ‘high degree of involvement’ with our clients’ fax distributions.”¹¹ For example, CyberData said that it does not “provide broadcast lists, nor do we prepare documents on behalf of clients.”¹² Furthermore, CyberData claimed that it “strongly advise[s] all ... clients to provide an ‘opt-out’ facility on every document they send” and makes “a reasonable effort to inform ... clients that legislation regulating fax broadcasting does exist,” although it does not “provide legal advice or analysis of their materials.”¹³

5. On July 18, 2007, in response to two additional consumer complaints concerning unsolicited facsimile advertisements from a mortgage company and a publisher,¹⁴ the Bureau issued the NAL to CyberData in the amount of \$13,500.¹⁵ On July 24, 2007, CyberData responded to the NAL, claiming again that “CyberData, Inc. is a messaging service bureau that does offer automated fax delivery as one of its services,” but that “CyberData did not have a high degree of involvement with any customers

⁶ 47 C.F.R. § 64.1200(f)(6).

⁷ 47 C.F.R. § 64.1200(a)(3)(vii) (emphasis added).

⁸ Citation from Kurt A. Schroeder, Deputy Chief, Telecommunications Consumers Division, Enforcement Bureau, File No. EB-06-TC-062, issued to CyberData, Inc. on Feb. 15, 2006.

⁹ See 47 U.S.C. § 503(b)(5) (authorizing the Commission to issue citations to non-common carriers and others who do not hold a license, permit, certificate, or other authorization issued by the Commission, or who are not applicants for any of those listed instrumentalities, for violations of the Act or of the Commission’s rules and orders).

¹⁰ Letter from Ralph Potente, President of CyberData, Inc., to Kurt A. Schroeder, Deputy Chief, Telecommunications Consumers Division, Enforcement Bureau, File No. EB-06-TC-062, received March 7, 2006.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ One complaint said the facsimile advertisement was from GMA Mortgage, Inc., while the second complaint involved a facsimile advertisement from Premier Publishing Service for a Who’s Who registry. In both cases, the transmissions were received from telephone numbers registered to CyberData.

¹⁵ In the NAL, the Bureau mistakenly stated that “CyberData did not request an interview or otherwise respond to the citation.” NAL, 22 FCC Rcd at 13132.

who sent faxes that may have been in violation with the Commission's rules and orders," and that "CyberData was not the 'sender' of said faxes."¹⁶ In addition, CyberData stated that it "maintain[s] a Blocking Database for anyone who contacts us directly and wishes us to block any dialing from our systems to their telephone number(s)" and that it "terminated all business with all of the entities that the FCC informed us were using our systems in violation of the rules and/or orders."¹⁷

III. DISCUSSION

6. Upon review of the record, including CyberData's February 2006 and July 2007 Responses, we conclude that CyberData presents a reasonable case that it complied with the requirements for facsimile broadcasters under the Commission's rules with respect to the advertisements at issue. Those advertisements offered services that CyberData does not appear to provide, and were apparently transmitted on behalf of other business entities,¹⁸ thus supporting CyberData's assertion that it was a "facsimile broadcaster," and not the "sender" of these advertisements.¹⁹ Further, the record offers no evidence inconsistent with CyberData's assertion that it does not have a high degree of involvement with those senders' transmissions. For example, the record contains no evidence that CyberData determined the content of the faxed messages, provided a source of fax numbers, made representations about the legality of faxing to those numbers, advised a client about how to comply with the fax advertising rules, or had actual notice of unlawful activity.²⁰ Finally, CyberData asserts that it has taken steps to prevent further unsolicited facsimile transmissions by creating a Blocking Database to avoid sending unsolicited ads to consumers, and by terminating all business with the entities that the FCC has determined are apparently violating the junk fax rules. We therefore conclude that the forfeiture proposed in the NAL should not be imposed.

IV. ORDERING CLAUSES

7. **ACCORDINGLY, IT IS ORDERED** that, pursuant to Section 503(b) of the Communications Act of 1934, as amended ("Act"), and Section 1.80(f)(4) of the Commission's Rules, 47 C.F.R. § 1.80(f)(4), and under the authority delegated by Sections 0.111 and 0.311 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311, the proposed forfeiture in the amount of \$13,500 issued to CyberData, Inc. in the July 18, 2007 Notice of Apparent Liability for Forfeiture for willful and repeated violations of a Commission order **WILL NOT BE IMPOSED**.

¹⁶ July 2007 Response at 1-2.

¹⁷ July 2007 Response at 2-3.

¹⁸ See n. 13, *supra*.

¹⁹ Compare 47 C.F.R. § 64.1200(f)(6) ("[t]he term *facsimile broadcaster* means a person or entity that transmits messages to telephone facsimile machines on behalf of another person or entity for a fee") with 47 C.F.R. § 64.1200(f)(8) ("[t]he term *sender* for purposes of paragraph (a)(3) of this section means the person or entity on whose behalf a facsimile unsolicited advertisement is sent or whose goods or services are advertised or promoted in the unsolicited advertisement").

²⁰ See 47 C.F.R. § 64.1200(a)(3); see also *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order*, 18 FCC Rcd 14014, 14129 ¶ 195 (2003); and *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order and Third Order on Reconsideration*, 21 FCC Rcd 3787, 3808 ¶ 40 (2006).

8. **IT IS FURTHER ORDERED** that a copy of this *Order* shall be sent by First Class Mail and Certified Mail Return Receipt Requested to CyberData, Inc. at its address of record, Attention: Ralph Potente, President, 20 Max Avenue, Hicksville, NY 11801.

FEDERAL COMMUNICATIONS COMMISSION

P. Michele Ellison
Chief, Enforcement Bureau